Contrary to petitioner's assertion, a full and fair reading of Romano actually supports the Eighth Circuit's decision that the prosecutor's remarks regarding the instantaneous death that would result from lethal gas violated the Eighth and Fourteenth Amendments. This Court's opinion in Romano apparently adopts the reasoning in Justice O'Connor's concurring opinion in Caldwell[2] which stated that an Eighth Amendment violation occurs only if:

> The prosecutor's remarks . . . were inaccurate and misleading in a manner that diminished the jury's sense of responsibility.

Caldwell, 472 U.S. at 342 (O'Connor, J., concurring).

Petitioner does not dispute the fact that the argument at issue in this case was inaccurate, misleading and totally specious. The critical question which the Eighth Circuit specifically addressed was whether this argument unconstitutionally diminished the jury's sense of responsibility for its sentencing decision. After a careful and reasoned analysis, the Eighth Circuit panel concluded that a sentencing decision based upon such an argument could not meet the heightened standards of reliability that the Eighth Amendment requires. (A - 5-8).

In Romano, this Court held that the jury was not affirmatively misled by the introduction of the petitioner's prior death sentence

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[2]"When no single rationale commands a majority, 'the holding of the court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.'" City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764, n. 9 (1988). Therefore, Justice O'Connor's concurring opinions in both Caldwell and Romano should be viewed as the holdings in those cases.

because that evidence was not false at the time it was admitted. As Justice O'Connor pointed out:

> The inaccuracy of the prosecutor's argument in Caldwell was essential to my conclusion that the argument was unconstitutional. [Romano]'s Caldwell claim fails because the evidence here was accurate at the time it was admitted. . . . Though evidence like that involved in this case can rise to the level of a Caldwell violation, to do so the evidence must be both inaccurate and tend to undermine the jury's sense of responsibility.

Romano, 114 S. Ct. at 2013, (O'Connor, J., concurring).

In sum, Caldwell and its progeny requires only two factors to be shown to establish an Eighth Amendment violation. First, it must be shown that the challenged argument or evidence was either inaccurate or misleading. Second, it must be shown that the challenged evidence or argument diminished the jury's sense of responsibility for imposing the death sentence. Both of these factors, as the Eighth Circuit panel demonstrated, are present in this case.

The flaw in petitioner's argument is that he reads a third requirement -- that the evidence or argument must also misdescribe the jury's role in the sentencing process -- to be necessary for a death sentenced inmate to prevail on a Caldwell claim. This third requirement advanced by petitioner is illogical and in conflict with Caldwell and Romano. The argument at issue in Caldwell did not technically misdescribe the jury's role because the jury's sentencing decision was in fact subject to appellate review.[3]

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[3]The challenged evidence in Romano also had nothing to do with describing the jury's role in the capital sentencing process.

The underlying evil addressed in Caldwell is the unmistakable fact that, when false evidence or an improper argument is presented, the sentencer is much more likely to impose death in a close case in violation of the fundamental Eighth Amendment principle that requires heightened reliability in capital sentencing proceedings. As a matter of logic and common sense, as the Eighth Circuit panel pointed out, the problem with the argument in this case is the plain and simple fact that the jurors were more likely to impose a death sentence, when they otherwise would not have, based solely on the improper, inaccurate, and irrelevant consideration that death by lethal gas would be instantaneous and painless. (A - 7).

To adopt petitioner's flawed reading of Caldwell would contradict almost two decades of this Court's Eighth Amendment jurisprudence. The core value of the Eighth Amendment's application to capital sentencing schemes is the requirement that the sentencer receive "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." Gregg v. Georgia, 428 U.S. 153, 190 (1976). In adhering to this principle, this Court has invalidated death sentences that have been tainted either by the consideration of inaccurate or false information or procedural rules that have tended to diminish the reliability of the sentencing determination in death penalty cases. Beck v. Alabama,

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Nevertheless, Justice O'Connor recognized that this evidence would have risen to the level of a Caldwell violation if it had been inaccurate. 114 S. Ct. at 2013 (O'Connor, J., concurring).

447 U.S. 625, 638 (1980); Johnson v. Mississippi, 486 U.S. 578 (1988).

The Eighth Circuit panel's opinion finding that the improper argument violated established Eighth Amendment principles does not conflict with, but instead reaffirms, fundamental values embodied in almost two decades of death penalty jurisprudence from this Court. As result, the petition for writ of certiorari should be denied.

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT PROPERLY FOUND THAT THE PROSECUTOR'S PENALTY PHASE ARGUMENTS VIOLATED RESPONDENT'S DUE PROCESS RIGHTS.

The final question petitioner presents for this Court's discretionary review is the panel's conclusion that the prosecutor's penalty phase arguments violated Respondent's due process rights. Petitioner contends that panel opinion applied a diluted standard of review to the prosecutor's closing arguments in the penalty phase of this trial. Petitioner apparently suggests that this Court grant review to clarify the appropriate standard of review in such situations.

It is absolutely unnecessary for this Court to grant certiorari on this question because the Eighth Circuit standard of review applied to Respondent's case, which is derived from Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990), is entirely and completely consistent with the due process standard of review that has been applied in numerous opinions from this Court. Nowhere in his argument does petitioner

contend that the Eighth Circuit standard derived from Newlon is inconsistent with any opinion from this Court. Instead, petitioner relies on fiery rhetoric from a solitary member of the Missouri Supreme Court who apparently resents the fact that state court decisions in death penalty cases are subject to independent federal review. (See Cert. pet. at 23).

Stripped to its essentials, petitioner's argument merely expresses disagreement with the application of well-settled due process principles to the peculiar facts presented in the closing arguments in Respondent's case. This disagreement does not provide a sufficient ground to justify this Court's exercise of its discretionary review.

Almost every death penalty case that comes before the federal courts for review includes a constitutional challenge to the prosecutor's penalty phase closing argument. These attacks are almost always unsuccessful. See e.g., Sloan v. Delo, 54 F.3d 1371, 1389, n. 19 (8th Cir. 1995); Blair v. Armontrout, 916 F.2d 1310, 1324 (8th Cir. 1990). Only in Newlon, and now in Respondent's case, has the Eighth Circuit found a prosecutor's penalty phase closing argument sufficiently egregious and so prejudicial as to entitle a condemned prisoner to a new penalty phase trial.

The Eighth Circuit panel in this case carefully and thoroughly applied the proper legal standard to the facts of Respondent's case. (A - 8-15). It concluded that Respondent's case contained a number of improper arguments which, although less numerous and less thematic than those in Newlon, nevertheless entitled

Respondent to penalty phase relief under due process standards. (A - 11-14). The panel considered the cumulative impact of the improper arguments and concluded that there was a reasonable probability that, but for these improper remarks, Respondent would not have been sentenced to death. In reaching this conclusion, the panel properly considered the totality of the circumstances of this case, including the strength of the evidence supporting the death penalty.[4] (A - 13-14).

A point apparently lost in petitioner's argument is that he concedes that the prosecutor's arguments were flagrantly improper. If a condemned prisoner cannot receive any penalty phase relief from arguments that were deemed so offensive by an eminent and respected Missouri jurist that they had "no place in an American courtroom"[5] it would be difficult to imagine that any death sentenced inmate could ever be entitled to habeas relief no matter how outrageous or inflammatory the argument presented at trial.[6]

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[4]There is no inconsistency between the analysis employed by the Eighth Circuit and the series of four Eleventh Circuit cases cited by petitioner. (See Cert. pet. at 24). Of those four cases, the Eleventh Circuit denied relief in Brooks and both Tucker cases because the evidence was overwhelming. However, in Drake, that court reversed the death sentence because, like Antwine's case, the evidence supporting the death sentence was much weaker.

[5]State v. Antwine, 743 S.W.2d 51, 74 (Mo. banc 1987) (Blackmar, J., dissenting).

[6]To strongly condemn an argument, yet do nothing about it, is, to paraphrase the words of Judge Jerome Frank, an abrogation of judicial duty. Overzealous prosecutors "are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking." United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2nd Cir. 1946)(Frank, J., dissenting).

The due process standard applied to challenges to penalty phase arguments is appropriately flexible and gives reviewing courts the ability to apply a totality of the circumstances test to the case at bar. In Respondent's case, the evidence supporting the death penalty was far from overwhelming. The Eighth Circuit panel, without dissent, concluded that Respondent was entitled to habeas relief. This well-reasoned decision should not be disturbed by this Court merely because the petitioner disagrees with the outcome.

CONCLUSION

For all the foregoing reasons, Respondent Calvert Leon Antwine respectfully requests that the writ of certiorari be denied.

Respectfully submitted,

JAY D. DeHARDT (#28258)
Counsel for Respondent
BOLAND, MCQUAIN, BLOCK
DeHARDT & ROSENBLOOM, P.C.
4505 Madison
Kansas City, MO 64111
(816) 531-0509

CERTIFICATE OF SERVICE

I hereby certify that I am CJA-appointed counsel for Respondent and that three true and correct copies of "Brief in Opposition to Petition for Writ of Certiorari" and "Respondent's Motion for Leave to Proceed *In Forma Pauperis*" in the case of Michael Bowersox v. Calvert Leon Antwine, No. 95-569, were mailed pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 22nd day of November, 1995, to:

Steven D. Hawke, Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri, 65102.

Twelve copies of the above-referenced Brief and Motion were mailed to William Suter, Clerk, United States Supreme Court, pursuant to Supreme Court Rule 39.5, this 22nd day of November, 1995.

Jay D. DeHardt